No. 5905

In the United States Circuit Court of Appeals

For the Ninth Circuit

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THOMAS JOHNSON,

Appellant,

vs.

CLARENCE R. HOTCHKISS,
United States Marshal for the
District of Oregon,

Appellee.

Upon Appeal from the United States District Court
for the District of Oregon

Brief of Appellee

Names and address of Attorneys of Record:

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STATEMENT OF FACTS

On the 16th day of January, 1929, an indictment was returned in the United States District Court for the Western District of Washington, Northern Division, against Thomas Johnson, the above-named appellant, and six other persons. Said indictment charged a violation of Section 37 of the Penal Code—conspiracy to violate the Act of October 28, 1919, known as the National Prohibition Act, and conspiracy to violate the Act of February 21, 1922, known as the Tariff Act—and violation of Section 593 of the Tariff Act of 1922.

A bench warrant was issued and delivered to the United States Marshal of the District, who, on the 16th day of January, 1929, made a return to the effect that the defendant, Thomas Johnson, could not be found within the said district.

On the 18th day of January, 1929, a removal complaint was filed with the United States Commissioners at Portland, Oregon, upon which removal complaint a warrant was issued and a hearing was had before said Commissioner. At the hearing a certified copy of the indictment returned against the defendant in the Western District of Washington, Northern Division, was introduced, and witnesses were produced who testified that the defendant was the same person mentioned in the indictment and warrant, and the person

sought to be removed. The Government having thus made out a prima facie case for removal, rested and the defendant then testified in his own behalf attempting to show that he was not the party referred to in the indictment; that he was not in the State of Washington at the times mentioned in the indictment and was not acquainted with the other defendants. The defendant also testified that he was not guilty of the charge mentioned in the indictment.

Four of the other persons joined in the indictment then testified that they were not acquainted with Thomas Johnson and had never seen him before. Character witnesses were then produced who said that the defendant's reputation for paying his bills and for truth and veracity was good, but defendant's counsel offered no evidence to show the defendant's reputation as to being a law-abiding citizen or that he was not a violator of the prohibition laws, and strenuously objected to a cross-examination of character witnesses along this line.

The Government then produced testimony of a Government witness tending to show that the defendant, Thomas Johnson, was the identical person mentioned in the indictment and that the defendant was guilty of the offense mentioned therein.

After hearing all the evidence, the Commissioner made an order to the effect that probable cause had been shown to believe the defendant guilty of the offense charged in the indictment and held the said defendant, Thomas Johnson, to bail in the sum of $2,500 for his appearance before the United States District Court.

On February 27, 1929, the matter came on for hearing before the District Court on a writ of habeas corpus and also an application for removal, and, after hearing, the Court ordered and adjudged that the writ of habeas corpus be denied and that removal be granted to the Western District of Washington, Northern Division, and that said removal be stayed pending appeal to the Circuit Court of Appeals for the Ninth Circuit.

This case is now before this Court to determine whether or not error was committed by the District Court or the Commissioner in holding the defendant, Thomas Johnson, for removal.

POINTS AND AUTHORITIES

I.

Section 1014 R. S. provides that for any crime against the United States where any offense is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender is

imprisoned, seasonably to issue and of the Marshal to execute a warrant for his removal to the district where the trial is to be had.

II.

Before issuing his warrant for defendant's removal, the District Judge must consider four things: (1) That the indictment charges an offense against the United States; (2) The identity of the person whose removal is sought with the party indicted; (3) That the court of the district to which he is to be removed has jurisdiction to try him for the offense charged; (4) That there is probable cause to believe that he committed the offense with which he is charged.

> United States ex rel Brody vs. Hecht, 11 Fed. (2) 128, 132.

III.

A certified copy of the indictment and proof of identity of defendant is prima facie evidence of the existence of probable cause in removal proceedings.

> United States vs. Mathues, 12 Fed. (2) 787, 788;
>
> Beavers vs. Henkel, 194 U. S. 73;
>
> Green vs. MacDougall, 199 U. S. 601;
>
> United States vs. Campbell, 179 Fed. 762;
>
> Tassell vs. Mathues, 11 Fed. (2) 53;

United States ex rel Brody vs. Hecht, 11 Fed. (2) 128.

IV.

It is well settled that all disputed questions of fact and all disputed matters of law arising on an application for removal are for the determination of the court in which the indictment was returned.

Parker vs. United States, 3 Fed. (2) 93, 94;
Rowe vs. Boyle, 268 Fed. 809;
Haas vs. Henkle, 216 U. S. 462, 30 S. Ct. 549, 54 L. Ed. 569, 17 Ann. Cas. 112;
Henry vs. Henkel, 235 U. S. 219, 35 S. Ct. 54, 59 L. Ed. 203;
Stallings vs. Splain, 253 U. S. 339, 40 S. Ct. 537, 64 L. Ed. 940;
Louie vs. United States, 254 U. S. 548, 41 S. Ct. 188, 65 L. Ed. 399;
Rodman vs. Pothier, 264 U. S. 399, 44 S. Ct. 360, 68 L. Ed. 759.

V.

The Commissioner is not bound to believe the testimony of the petitioner and his co-defendants, especially when such testimony is negative, and amounts only to a denial, or plea of not guilty.

Mangus vs. Keville, 6 Fed. (2nd) 157, 159;
Fitzgerald vs. United States, 6 Fed. (2nd) 156;

Beavers vs. Houbert, 198 U. S. 77, 90;
United States vs. Krevitt, 9 Fed. (2nd) 964.

VI.

The indictment is regarded as evidence of probable cause and not merely as offering a presumption which would disappear as soon as contravening evidence was offered.

Hastings vs. Murchie, 219 Fed. 83;
Hide vs. Shine, 199 U. S. 62;
Mangus vs. Keville, 6 Fed. (2nd) 157;

VII.

Within the spirit of the rule of giving full effect to the records and judicial proceedings of another Court, an indictment found by the proper Grand Jury should be accepted after hearing throughout the United States, as at least prima facie evidence of the existence of probable cause.

Beavers vs. Hinkle, 194 U. S. 85.

VIII.

Where a defendant and other parties are charged with conspiracy to violate a statute, evidence at a removal hearing that a defendant was not physically present at the place and at the date specified in the indictment, is not sufficient to overcome the prima facie case made by the indictment.

United States vs. Krevitt, 9 Fed. (2nd) 964;

United States vs. Reddin et al., 193 Fed. 798.

IX.

If the Judge entertains a doubt as to his duty to issue the warrant of removal, he should make the removal order, because such doubt, if any, whether in law or in fact, should be determined at the place of trial.

United States vs. Hecht, 11 Fed. (2nd) 128, 133.

ARGUMENT

In removal cases it is uniformly held that a certified copy of the indictment, supported by proof of the identity of the defendant sought to be removed establishes a prima facie case for removal. Appellant concedes this proposition on Page 10 of his brief, where he says "if the Commissioner had heard no evidence, the indictment and the categorical identification of appellant (however shaken on cross-examination) by Hargrove would probably have been sufficient to authorize removal."

It is argued, however, that the prima facie case thus established was overcome by the testimony of the defendant and his witnesses. If such prima facie case is overcome by the testimony of the defendant and his witnesses we concede that the

government should then produce some evidence of probable cause other than the indictment.

Let us first consider whether the prima facie case established by the government is overcome by the testimony of the defendant and his witnesses. The testimony produced by the defendant is little, if any, more than a plea of not guilty. He does not state any substantive fact which, if believed by the Commissioner, would overcome the prima facie case made by the government. The fact, if it be a fact, that defendant was not in the State of Wsahington at the date mentioned in the indictment and not acquainted with some or any of the other defendants would not preclude the defendant from participation in the offense pleaded in the indictment. An examination of the defendant's testimony shows that it only amounts to a plea of not guilty, and such a plea does not overcome the prima facie case made by the indictment.

The testimony of the four co-defendants to the effect that they were not acquainted with Thomas Johnson and never saw him in the State of Washington, even if believed by the Commissioner, would not overcome the prima facie case made by the indictment. Thomas Johnson could be one of the conspirators and guilty as charged in the indictment, though he was not physically present

in the State of Washington at the date of the offense and not personally acquainted with some or any of the other defendants.

The character witnesses for defendant furnished no evidence of defendant's reputation as a law-abiding citizen and carefully refrained from saying what the defendant's reputation was as to being a violator of the Prohibition Law; hence, the testimony of the character witnesses could have no weight in overcoming the prima facie case made by the indictment.

If no other evidence had been introduced by the Government the Commissioner ought to have found that there was probable cause shown. But other evidence was introduced. The Government introduced testimony as follows:

> "Well, this is the Mr. Johnson that is connected with the alleged acts that are set forth in the indictment as to the other defendants. I am somewhat familiar with his activities in connection with the charges contained. However, I testifed I have never talked wth the man, although I have seen him on various occasions under circumstances in connection with the charges as set forth in the indictment, to know to my own satisfaction, at least, that it is the same man that is referred to in the indict-

ment." (Testimony of R. E. Herrick, P. 28, 29, Printed Transcript.)

"I know this is the man that the Grand Jury should have indicted, at least." (Testimony of R. E. Herrick, P. 41, Printed Transcript.)

"Bisbee asked him, asked Boyd, if the colored fellow from Portland had arrived the other night. Boyd said 'Yes, I am sorry you didn't get to meet him. He handles our Portland end of the business and has been very successful.' And he said 'He should have been a white man. Although he is colored, he is a whole lot whiter than a whole lot of white men.' Bisbee said he was sorry he didn't get to meet him that night but that he had a previous engagement. This is about the gist of that conversation." (Testimony of B. F. Hargrove, P. 67 Printed Transcript.)

"Bisbee asked Boyd if they were still handling liquor to Portland in baggage cars. Boyd said no they weren't; they had to cut that out; that they were transporting it down there in automobiles; that is about all the conversation that had any relation to Johnson.

"Q. Now, prior to that time, Mr. Hargrove, and on or about the 15th or March of 1928, did you see the defendant Tom Johnson?

A. I did.

Q. Where?

A. In the S. P. & S. coach yards.

Q. Where?

A. Portland."

* * * *

"A. Well, I saw Tom Johnson that night leave a certain house on Fargo Street here occompanied by another automobile. We lost him and then picked him up in the S. P. & S. coach yards; one car was backed up against a coach; Johnson's car was standing over near the switch end. He was driving the car prior to the time it got there.

Q. At that time were you accompanied by anyone else, Mr. Hargrove?

A. Ralph E. Elder.

Q. Did you go right up to where the car was?

A. We did. We flushed them, run into them. We didn't know just where they were and we run into them and they scattered and kept on going.

Q. What time of the day or night was this?

A. It was about midnight.

Q. Where were these men when you saw them; you say you flushed them.

A. They were standing right alongside of this combination baggage and mail car.

Q. One of the automobiles, you say, was parked right by it?

A. Was backed up against it, between two shanties that had been set on the ground."

(Testimony of B. F. Hargrove, P. 69, 70, Trans.)

The foregoing and other evidence presented by the government is entitled to as much consideration as the evidence produced by the defendant, and after hearing and considering all the evidence, the Commissioner found "and probable cause has been shown to believe defendant guilty of said offense."

Appellant says, on Page 8 of his brief, "We do not dispute, of course, that this court should not inquire into the mere question of the weight of evidence before the Commissioner." We presume appellant will also concede our Point IV, to the effect that:

"It is well settled that all disputed questions of fact and all disputed matters of law arising on an application for removal are for

> the determination of the court in which the indictment was returned."

Assuming this proposition to be true, we call attention to the fact that if evidence, both for and against the defendant, was introduced before the Commissioner, the Commissioner had a legal right to make the finding which he did at the close of the case. It may be that the evidence for the defendant is only, in effect, a plea of not guilty, and it may be that the evidence for the government is only, in effect, a statement that the defendant is guilty. (However, we contend that the government's evidence goes further than that.) But if such were the fact, and there was doubt in the mind of the Commissioner, it was the Commissioner's duty to make the order of removal, where the matter can be tried out in the court where the indictment was returned.

Appellant argues in his brief that, as the acts set out in the indictment set forth the acts of each defendant except Thomas Johnson, under the rule of United States ex rel Mayer vs. Glass, 25 Fed. (2) 941, no conspiracy is charged against Johnson. We call attention to the fact that the indictment does charge a conspiracy by Johnson and others. It is also charged that some of the conspirators committed overt acts in carrying out the conspir-

acy. This, we think, is sufficient. It is not necessary that all defendants should participate in an overt act.

If, however, as in the case cited by counsel, the facts claiming to show participation of a defendant are set forth in the indictment and the court can say from the facts set forth that the defendant has committed no offense, then, of course, the court could and should say there is no probable cause shown.

In this case, it cannot be said that the government is relying on acts of the defendant which the court can say, from an examination of the indictment, constitute no offense by the defendant. If the defendants conspired to commit a criminal act and some of them committed an overt act in carrying out the conspiracy, then all are guilty of the conspiracy.

We respectfully submit that the introduction in this case, before the Commissioner, of a certified copy of the indictment, together with proof of the identity of the defendant, with the other evidence produced at the trial, fully warranted the Commissioner and the Court in making the orders made, and that there is no error.

Respectfully submitted,

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